

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

RICK GRESS,

Plaintiff,

v.

CONOVER INSURANCE, INC., a  
Washington corporation,

Defendant.

NO: CV-10-3056-RMP

ORDER GRANTING SUMMARY  
JUDGMENT

This matter comes before the Court on Defendant Conover Insurance, Inc.'s ("Conover") motion for summary judgment, ECF No. 16, against Plaintiff Rick Gress, a former employee of Conover. The Court heard oral argument on these issues on August 8, 2011, has reviewed the parties' submissions filed in relation to the motion and the remainder of the file in this case, and is now fully informed.

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## BACKGROUND

### *Procedural Posture*

Mr. Gress sued Conover Insurance, Inc. (“Conover”) in Yakima County Superior Court for: (1) a declaratory judgment that noncompetition and confidentiality provisions of a 2009 employment agreement between Gress and Conover are not enforceable; (2) damages for wrongful termination in violation of public policy as stated by the Washington Law Against Discrimination (“WLAD”), RCW Ch. 49.60, and/or the Americans with Disability Act (“ADA”) and the Washington State Family Care Act (“FLA”) Family Medical Leave Act (“FMLA”); and (3) reasonable attorney’s fees and costs. ECF No. 1-2. Conover removed the matter to federal Court. ECF No. 1.

### *Undisputed Facts*

Mr. Gress worked as an agent for Conover, an insurance agency in Yakima, Washington, from October 2001 through June 2010. Mr. Gress sold crop insurance to farmers in south central Washington. Mr. Gress received positive feedback from his clients for his professionalism and good service, as evidenced by the declarations of the present and former Conover clients who worked with Mr. Gress as their agent.<sup>1</sup> ECF No. 39, Attachments 1-13. Moreover, Conover

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<sup>1</sup> However, the Court notes that even among the positive statements submitted by Mr. Gress, there is evidence of some client discontent, such as the statement,

1 management recognized that he was responsible for a significant amount of new  
2 business by giving him the “Shooting Star” award for generating “2009 Growth  
3 Exceeding \$82,000.” ECF Nos. 49-1, 49-2, 49-3, and 40-1 at 1-2.

4 Mr. Gress executed an employment agreement in 2001 (“2001 employment  
5 agreement”) when he was hired by Conover. ECF No. 19-6. He executed a  
6 second employment agreement on February 19, 2009 (“2009 employment  
7 agreement”), which was accompanied by two attached schedules that Mr. Gress  
8 also signed, “Schedule A” and “Schedule B.” ECF Nos. 19-7, 19-8, and 19-9.  
9 Both the 2001 and 2009 employment agreements contain agreements not to  
10 compete. ECF Nos. 19-6, 19-7.

11 As an insurance agent, Mr. Gress frequently worked in the field, away from  
12 the office. As a result of being away from the office, Mr. Gress cooperated with  
13 customer service agents (“CSAs”) working in the office to enter the data into  
14 Conover’s system to enroll newly insured growers and to manage existing  
15 accounts. Mr. Gress worked with one CSA, Rita Fryer, until 2008 when he began  
16 to work with both Ms. Fryer and Jill Rawlings. Dep. of Gress, Vol. I, ECF No. 19-  
17 4 at 8-9.

18  
19 “There were times when I felt Rick could have given me better service; however, if  
20 Rick was not available, his staff was.” ECF No. 39-12 at 3.

1 Mr. Gress coached and managed American Legion baseball in summer 2009  
2 with the permission of Conover management. Dep. of Rick Gress, Vol. I, ECF No.  
3 19-4 at 21, 25. Mr. Gress recalls that he orally informed management at that time  
4 that his coaching commitment would last two or more years. Dep. of Gress, Vol. I,  
5 ECF No. 19-4 at 26-27. Mr. Gress further recalls that he promised the American  
6 Legion team that he would coach for both the 2009 and 2010 seasons. Dep. of  
7 Gress, Vol. II, ECF No. 19-13 at 10-11. Conover denies that there was any  
8 agreement in 2009, either oral or written, that Mr. Gress would be permitted by  
9 Conover to coach for two years or that Mr. Gress even discussed with his  
10 supervisors, in 2009, his intention to coach for two years. *See* Dep. of Kerri  
11 Record, ECF No. 19-10 at 10-11.

12 During summer 2009, the team that Mr. Gress coached played an average of  
13 six games per week, with many, if not all, scheduled as two games on the same  
14 date. Dep. of Gress, Vol. I, ECF No. 19-4 at 21-22. The team played away games  
15 at night and home games during the day. Dep. of Gress, Vol. I, ECF No. 19-4 at  
16 21-22. Mr. Gress recalls that he spent four to five hours per week coaching and  
17 managing during the season, which consisted of June and July continuing into  
18 early August if the team made the playoffs. Dep. of Gress, Vol. I, ECF No. 19-4 at  
19  
20

1 21-22.<sup>2</sup> Beginning in April or May, he also spent one to two hours per week  
2 recruiting players for the team. Dep. of Gress, Vol. I, ECF No. 19-4 at 24. Ms.  
3 Fryer, Mr. Gress's support staff, complained to Mr. Gress's supervisor that Mr.  
4 Gress was not as available as she needed him to be during summer 2009. Dep. of  
5 Kerri Record, ECF No. 19-10 at 7.

6 On December 5, 2009, Mr. Gress broke both of his wrists in an accident that  
7 occurred outside of work. ECF Nos. 19-4 at 13; 41-1 at 2. A Conover employee  
8 informed Jenny Gress, Mr. Gress's wife, of Mr. Gress's option to take short-term  
9 disability pursuant to a supplemental insurance policy that Mr. Gress had  
10 purchased. ECF No. 41-1 at 3. Ms. Gress also was provided with the short-term  
11 disability paperwork if Mr. Gress decided to pursue it. ECF No. 41-1 at 3. Ms.  
12 Gress perceived that Conover employees were pressuring Mr. Gress, through their  
13 communications with her, to take short term disability. ECF No. 41-1 at 4-5. Mr.  
14 Gress did not take short-term disability. Dep. of Gress, Vol. I, ECF No. 19-4 at  
15 35-36.

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17 <sup>2</sup> This recollection appears inconsistent with playing an average of six games, but  
18 the Court accepts it as true in the context of viewing the facts in the light most  
19 favorable to Mr. Gress, who is the non-moving party in this summary judgment  
20 motion.

1 It is unclear how much time Mr. Gress took off from work immediately  
2 following the accident, but the parties agree that he began to work again shortly  
3 after he was injured. During the approximately two months that Mr. Gress had  
4 casts on his wrists, he could not write or drive. Therefore, with the permission of  
5 Conover management, Ms. Gress drove him to his work appointments, and a  
6 customer service agent (CSA) accompanied them. ECF No. 19-4 at 15-16. CSAs  
7 at Conover normally work from the office and enter data into Conover's computer  
8 system, so providing a CSA to accompany Mr. Gress in the field to complete  
9 paperwork for him was a departure from standard work responsibilities. ECF No.  
10 19-4 at 14-15.

11 At the end of March 2010, Mr. Gress had his casts removed and underwent  
12 surgery associated with the cast removal. Mr. Gress was "laid up" for  
13 approximately one week following the surgery, although it is unclear from the  
14 record whether he continued to work for Conover during that week or was on  
15 leave. *See* Dep. of Gress, Vol. I, ECF No. 19-4 at 18-19. At his deposition, Mr.  
16 Gress stated that he did not recall requesting any accommodation from Conover  
17 that Conover denied, either before or after his casts were removed. ECF No. 19-14  
18 at 16-18.

19 During the early part of 2010, Conover supervisors conducted annual  
20 reviews with agents about their performance and corresponding compensation for

1 the previous year, 2009, and about goals for 2010. ECF Nos. 19-10; 39-16. Mr.  
2 Gress and his supervisor at Conover, Kerrie Record, and Conover's chief operating  
3 officer, Connie Morrow, disagreed about the amount that Mr. Gress was owed for  
4 his bonus. ECF No. 39-16. Ms. Record and Ms. Morrow thought that it was  
5 appropriate to deduct as a "bad debt" the amount of a claim made against Conover  
6 by an insured contesting a claim that Conover previously had denied. Dep. of  
7 Record, ECF No. 39-16 at 5-6. According to Ms. Record, Conover could not seek  
8 coverage for the loss from its errors and omissions insurance carrier because Mr.  
9 Gress had admitted to the client that the denial in coverage had been Conover's  
10 fault, which nullified any defenses Conover could raise with the insurance carrier.  
11 Dep. of Record, ECF No. 39-16 at 5-6. In addition, during the annual review  
12 process, two other Conover insurance agents complained to Ms. Record about Mr.  
13 Gress's unavailability during baseball season. ECF No. 19-10 at 9.

14 On March 29, 2010, Ms. Record wrote Mr. Gress an email expressing  
15 concern about a "rumor" she had heard that Mr. Gress intended to coach American  
16 Legion baseball again for the summer 2010 season. Mr. Gress met with Ms.  
17 Record and Ms. Morrow on April 5, 2010, to discuss the coaching issue as well as  
18 other matters. Mr. Gress recalls that Ms. Record and Ms. Morrow asked him  
19 whether he already had a contract to coach baseball in summer 2010, and he told  
20 them that he did not but that Conover already had approved his coaching in 2009.

1 Dep. of Gress, Vol. I, ECF No. 19-4 at 29-30. Ms. Record and Ms. Morrow  
2 proceeded to tell Mr. Gress that they would not approve his coaching in 2010  
3 because of his recent absence from work and the negative effect his coaching had  
4 on his work in 2009. Mr. Gress responded that he would not ruin his reputation,  
5 and Conover's reputation, by cancelling his plans to coach so close to the  
6 beginning of the season. Dep. of Gress, Vol. I, ECF No. 19-4 at 30. As Mr. Gress  
7 recalls, "And [Ms. Record and Ms. Morrow] said if I was going to coach, that I  
8 would be hearing from their attorney, with the possible grounds of termination."  
9 Dep. of Gress, Vol. I, ECF No. 19-4 at 30.

10 Ms. Record and Ms. Morrow memorialized the conversation in an email  
11 immediately following the meeting in April 2010:

12 We told Rick that we would not approve for him to coach or manage  
13 the Pasco Sun Devils this season. Based on input from his team and  
14 the Ag producers he works with, he essentially took last summer off  
15 and we will not allow that to happen again this year. Rick was upset  
16 by this and is adamant that he continued to work the entire baseball  
17 season, that he is one of our top producers and he always puts  
18 numbers up for Conover. We told him that we felt with all of the time  
19 he has had off to recover from his accident, the time he may need to  
20 be with his daughter and the possibility of another surgery for him it's  
really unbelievable that he would consider taking more time away  
from work. Rick contends that he told me last year that this was a  
multiple year deal. I explained that I was not aware that is was a  
multi-year deal and had I known I never would have approved it. We  
let him know that coaching or managing the team is a violation of his  
employment agreement with Conover and we will not approve it. Rick  
went back to repeating that he has never stopped working, he is one of  
our top producers and baseball season does not affect his ability to do  
his job. He feels as though Conover is "coming down on him" and he

1 hasn't done anything to deserve it. Connie explained that Conover has  
2 been more than supportive of Rick through the years including these  
3 past several months as he has been recovering from his surgeries, we  
4 are not supportive of him coaching/managing baseball this year, he  
needs to do what he thinks is right and we will do what we think is  
right. [Added by Connie Morrow]-he was advised that coaching the  
team for a fee would be a violation of his employment agreement.

5 ECF No. 39-21 at 2.

6 Mr. Gress also received a bonus check during the April 5 meeting for the  
7 amount that Mr. Gress had claimed he was owed in February 2010 when Conover  
8 withheld the bonus amount as bad debt. *See* ECF No. 40-2 at 4. Although he  
9 received his full bonus, Ms. Record and Ms. Morrow informed Mr. Gress that the  
10 matter of Mr. Gress's informing the client that Conover would be responsible for  
11 paying the loss "even after [Mr. Gress] was told specifically not to do that" would  
12 be written up and added to his personnel file as a breach of the company's  
13 procedures. ECF No. 39-21 at 2.

14 In late April 2010, Mr. Gress's daughter underwent brain surgery in Seattle.  
15 Mr. Gress was absent from work for approximately two weeks, between April 22  
16 until May 10, 2010. ECF No. 40-2 at 5-6. Although he had discussed with Ms.  
17 Record the possibility of taking family medical leave following his daughter's  
18 surgery, Mr. Gress ultimately did not request or take any family medical leave.  
19 Dep. of Gress, Vol. 3, ECF No. 19-13 at 7.

1 In approximately May 2010, Mr. Gress signed a contract to manage and  
2 coach the American Legion baseball team for the 2010 season. Dep. of Gress, Vol.  
3 2, ECF No. 19-13 at 5. Around the same time, the more experienced of the two  
4 CSAs with whom Mr. Gress worked, Ms. Fryer, began a period of maternity leave.  
5 ECF Nos. 19-4 at 31. Ms. Rawlings, the other CSA with whom Mr. Gress worked,  
6 expressed concerns to Ms. Record that Mr. Gress would be unavailable for work if  
7 he coached again in summer 2010. Decl. of Jill Rawlings, ECF No. 20 at 2-3. Ms.  
8 Rawlings previously had reported to Ms. Record, around January 2010, that she  
9 had difficulty reaching Mr. Gress when he was working with his wrist injury and  
10 when he coached during summer 2009. Decl. of Jill Rawlings, ECF No. 20 at 2-3.  
11 Ms. Rawlings also reported that she had received complaints from clients about  
12 Mr. Gress being unresponsive. Decl. of Jill Rawlings, ECF No. 20 at 2-3.

13 Mr. Gress's decision to coach the baseball team in summer 2010 came to the  
14 attention of Conover when Ms. Morrow read a June 8, 2010, local newspaper  
15 article that referred to Mr. Gress as the team coach. Dep. of Morrow, ECF No. 19-  
16 15; ECF No. 19-17 at 2. Ms. Morrow brought the article to the attention of  
17 Conover's chief executive officer, Brad Green, and Conover management met with  
18 Mr. Gress on June 9, 2010. At the meeting, Mr. Green, Ms. Morrow, and Ms.  
19 Record confronted Mr. Gress with the information contained in the newspaper  
20 article, and Mr. Gress responded that it was his intention to coach that summer.

1 Conover management informed Mr. Gress that they viewed his decision to coach  
2 again as insubordination. Dep. of Bradley Green, ECF No. 19-19 at 14. Mr. Gress  
3 left the meeting shortly after it began. Dep. of Bradley Green, ECF No. 19-19 at  
4 14. At the conclusion of the meeting, Conover management placed Mr. Gress on  
5 suspension to allow further investigation of the matter. Dep. of Bradley Green,  
6 ECF No. 19-19 at 14-17.

7 Conover terminated Mr. Gress on June 16, 2010. The termination letter  
8 stated, in part:

9 On April 5 of this year, you had a meeting with Connie Morrow, the  
10 Company's Chief Operating Officer, and Kerri Record. At that  
11 meeting you were advised that your continued involvement with the  
12 Sun Devils would not be authorized by the Company. They explained  
13 that your activities with the Sun Devils unduly interfered with your  
14 employment duties last season and they instructed you that failure to  
15 terminate your participation with the team would jeopardize your  
16 employment with the Company. They further advised you that your  
continued involvement with the team would violate Section 2 of your  
EE Agreement. You made it clear at that time that you did not intend  
to terminate your relationship with the Sun Devils. It has now  
definitively come to our attention that you have not in fact resigned  
your position with the Sun Devils as directed, a failure which  
constitutes both a breach of your EE Agreement and an intolerable  
disregard of an express directive from management.

17 ECF No. 19-5 at 2.

## 18 ANALYSIS

19 This Court exercises jurisdiction over this matter pursuant to 18 U.S.C. §  
20 1331 (federal question) and the doctrine of pendent jurisdiction, 18 U.S.C. § 1367.

### ***Summary Judgment Standard***

Summary judgment is appropriate “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed.R.Civ.P. 56(a). A key purpose of summary judgment “is to isolate and dispose of factually unsupported claims . . . .” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). Summary judgment is “not a disfavored procedural shortcut,” but is instead the “principal tool[ ] by which factually insufficient claims or defenses [can] be isolated and prevented from going to trial with the attendant unwarranted consumption of public and private resources.” *Celotex*, 477 U.S. at 327.

The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. *See Celotex*, 477 U.S. at 323. The moving party must demonstrate to the Court that there is an absence of evidence to support the non-moving party's case. *See Celotex Corp.*, 477 U.S. at 325. The burden then shifts to the non-moving party to “set out ‘specific facts showing a genuine issue for trial.’” *Celotex Corp.*, 477 U.S. at 324 (quoting Fed.R.Civ.P. 56(e)).

A genuine issue of material fact exists if sufficient evidence supports the claimed factual dispute, requiring “a jury or judge to resolve the parties' differing versions of the truth at trial.” *T.W. Elec. Service, Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir.1987). At summary judgment, the court draws

1 all reasonable inferences in favor of the nonmoving party. If the nonmoving party  
2 produces evidence that contradicts evidence produced by the moving party, the  
3 court must assume the truth of the nonmoving party's evidence with respect to that  
4 fact. *T.W. Elec. Service, Inc.*, 809 F.2d at 631. The evidence presented by both the  
5 moving and non-moving parties must be admissible. Fed.R.Civ.P. 56(e).  
6 Furthermore, the court will not presume missing facts, and non-specific facts in  
7 affidavits are not sufficient to support or undermine a claim. *Lujan v. Nat'l*  
8 *Wildlife Fed'n*, 497 U.S. 871, 888-89 (1990).

9 ***Wrongful Termination in Violation of Public Policy***

10 In Washington, employment of indefinite duration generally may be  
11 terminated by either the employer or the employee at any time, with or without  
12 cause. *Bulman v. Safeway, Inc.*, 144 Wn.2d 335, 340 (2001).

13 One narrowly drawn exception to the general rule of at-will employment is  
14 for wrongful discharge in violation of public policy. *Danny v. Laidlaw Transit*  
15 *Servs., Inc.*, 165 Wn.2d 200, 207 (2008). A plaintiff pursuing a claim for damages  
16 on the basis of wrongful discharge in violation of public policy in Washington  
17 must prove the following elements:

18 (1) the existence of a clear public policy (the clarity element); (2) that  
19 discouraging the employee's conduct would jeopardize the public  
20 policy (the jeopardy element); and (3) "that the public-policy-linked  
conduct caused the dismissal" (the causation element).

*Hubbard v. Spokane County*, 146 Wn.2d 699, 707 (Wash. 2002).

1 In addition, the employer must not have an overriding justification for the  
2 dismissal for the plaintiff to prevail. *Hubbard*, 146 Wn.2d at 707 (*quoting*  
3 *Gardner v. Loomis Armored, Inc.*, 128 Wn.2d 931, 941 (Wash.1996)). This public  
4 policy exception to the general rule of at-will employment has been recognized in  
5 four situations: “where the employee is fired (1) for refusing to commit an illegal  
6 act; (2) for performing a public duty or obligation; (3) for exercising a legal right  
7 or privilege; and (4) in retaliation for reporting employer misconduct.” *Hubbard*,  
8 146 Wn.2d at 707–08.

9 To avoid dismissal of a wrongful discharge at the summary judgment stage,  
10 the plaintiff employee must survive the burden shifting framework established by  
11 *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973) and adopted in  
12 Washington in *Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 180-82 (Wash. 2001),  
13 *overruled on other grounds by McClarty v. Totem Elec.*, 157 Wn.2d 214 (Wash.  
14 2006). The plaintiff must first make a prima facie case of retaliatory discharge by  
15 showing that (1) he engaged in a statutorily protected activity, (2) the activity was  
16 followed by an adverse employment action, and (3) there is a causal link between  
17 the protected activity and the adverse action. *Stegall v. Citadel Broadcasting Co.*,  
18 350 F.3d 1061, 1065-66 (9th Cir. 2003).

19 In establishing a prima facie case, the employee need only establish that the  
20 employer’s retaliatory motive was a substantial factor behind the termination.

1 *Renz v. Spokane Eye Clinic, P.S.*, 114 Wn. App. 611, 621 (Wash. App. Div. 3  
2 2002). A factor supporting the termination is substantial if “it so much as tips the  
3 scales one way or the other.” *Renz*, 114 Wn. App. at 621. Because employers  
4 infrequently announce a retaliatory motive, employees ordinarily must resort to  
5 circumstantial evidence to show it. *Estevez v. Faculty Club of the Univ. of Wash.*,  
6 129 Wn. App. 774, 799, (Wash. App. Div. 1 2005).

7 If the plaintiff establishes a prima facie case, “the evidentiary burden shifts  
8 to the defendant to produce admissible evidence of a legitimate, nondiscriminatory  
9 explanation for the adverse employment action sufficient to ‘raise[ ] a genuine  
10 issue of fact as to whether [the defendant] discriminated against the plaintiff.’”  
11 *Hill*, 144 Wn.2d at 181 (*quoting Texas v. Dep't of Cmty. Affairs v. Burdine*, 450  
12 U.S. 248, 254, (1981)); *Renz*, 114 Wn. App. at 622.

13 If the defendant employer meets that burden, the burden shifts back to the  
14 employee to demonstrate that the employer's articulated rationale was not the true  
15 reason for its action but rather a pretext for discrimination. *Hill*, 144 Wn.2d at 182,  
16 23 P.3d 440; *Renz*, 114 Wn. App. at 622, 60 P.3d 106. If the plaintiff cannot show  
17 pretext, the defendant is entitled to judgment as a matter of law. *Hill*, 144 Wash.2d  
18 at 182, 23 P.3d 440.

19 Summary judgment is appropriate even where the plaintiff establishes a  
20 prima facie case but rebuts the defendant’s proffer of a nondiscriminatory basis for

1 the termination with weak evidence of pretext or if the record contains abundant,  
2 uncontroverted evidence of the nondiscriminatory reason for the employer's  
3 decision. *Milligan*, 110 Wn. App. at 637. Conversely, if the parties meet all three  
4 *McDonnell Douglas* intermediate burdens and the record contains reasonable but  
5 competing inferences of both discrimination and nondiscrimination, a factfinder  
6 must choose between such inferences and summary judgment is inappropriate.  
7 *Hill*, 144 Wash.2d at 186, 23 P.3d 440.

8 Mr. Gress contends that he was fired for exercising a legal right to medical  
9 leave, indicating that he would need to take family medical leave, and challenging  
10 pay deductions that violated the compensation terms of his employment agreement  
11 with Conover.

12 There is likely public policy in Washington under the FMLA and the WFLA  
13 entitling all employees to take reasonable medical leave. *Fischer v. City of Roslyn*,  
14 2011 WL 2639931, \*7 (Wash. App. Div. 3 2011) (unpublished), and prohibiting  
15 discrimination on the basis of disability, *Sedlacek v. Hillis*, 145 Wn.2d 379, 385,  
16 (Wash. 2001). However, regarding the third element required to make a prima  
17 facie showing of retaliatory discharge, Mr. Gress puts forth only extremely  
18 attenuated evidence of a causal link between his termination and his participation  
19 in any activity that these public policies seek to promote. *See Stegall*, 350 F.3d at  
20 1065-66. Specifically, Mr. Gress emphasizes the following sentence of the email

1 by Ms. Record and Ms. Morrow regarding the April 5, 2010, meeting with Mr.  
2 Gress: “We told him that we felt with all of the time he has had off to recover from  
3 his accident, the time he may need to be with his daughter and the possibility of  
4 another surgery for him it's really unbelievable that he would consider taking more  
5 time away from work.” ECF No. 39-21 at 2.

6 The phrase quoted above indicates simply that Mr. Gress’s need to take  
7 substantial leave for other events in his life in 2009 and 2010 influenced his  
8 supervisors’ decision not to approve his coaching baseball in summer 2010. There  
9 is nothing to indicate that Conover management’s decision to terminate Mr. Gress  
10 in June 2010 was causally linked to his wrist injury in December 2009, for which  
11 Mr. Gress received every minor accommodation he requested and argued himself  
12 was not a disability, or the time that he took off for his daughter’s surgery, for  
13 which he did request any family medical leave. ECF No. 40-2 at 4. In addition,  
14 Mr. Gress’s pay dispute appears to have been resolved at the April 5, 2010,  
15 meeting, more than two months before he was fired. ECF No. 40-2 at 4. The  
16 clear, uncontroverted evidence in the record supports that Mr. Gress’s own  
17 subordination broke any chain of events between the disability, family medical  
18 leave, and compensation-related activities and his termination. Therefore, Mr.  
19 Gress does not make a prima facie case of wrongful discharge in violation of  
20 public policy. *See Stegall*, 350 F.3d at 1065-66.

1 Even if the Court were to find that Mr. Gress established a prima facie case,  
2 his wrongful discharge claim would fail as a matter of law on the basis of the  
3 evidence that Conover put forth showing an overriding justification of his  
4 termination, specifically Mr. Gress's insubordination in deciding to coach again in  
5 the summer of 2010 despite his supervisors' direct orders not to do so, and his  
6 work performance issues. Mr. Gress fails to provide any evidence to support that  
7 Conover's stated reasons for the termination are pretext.

8 Plaintiff argues that there are several factual disputes in the briefing and  
9 accompanying declarations and exhibits before the Court that should foreclose a  
10 summary judgment. However, none of the disputes is material to the elements of a  
11 retaliatory discharge claim or support that Conover's claim that Mr. Gress was  
12 terminated for insubordination and related performance issues was pretextual. *See*  
13 *Hubbard*, 146 Wn.2d at 707.

14 First, the parties dispute whether Conover management knew of Mr. Gress's  
15 intention to coach baseball for two years when they approved his 2009 coaching in  
16 February 2009. When asked at his deposition why he signed the contract for the  
17 summer 2010 coaching position when he knew that he could lose his job for  
18 agreeing to coach in 2010, Mr. Gress stated, "For one, they approved it. For two, I  
19 didn't want to ruin my reputation in the community." Dep. of Gress, Vol. II, ECF  
20 No. 19-13 at 9. Yet Mr. Gress presents no evidence apart from his own

1 recollection that Conover agreed that he could coach for 2009 and 2010. Even if  
2 Mr. Gress could supply additional evidence that Conover was aware that Mr. Gress  
3 intended to coach for two years, Conover's purported knowledge does not relate to  
4 a protected activity under the state and federal statutory schemes referred to by Mr.  
5 Gress's complaint.

6 The second alleged dispute concerns Mr. Gress's work performance. Mr.  
7 Gress contends that his work performance did not suffer as a result of his coaching  
8 during summer 2009 and argues that he received an award for the amount of new  
9 insurance that he wrote in 2009. The Court agrees that the record contains  
10 conflicting evidence regarding Mr. Gress's work performance. Yet, the record  
11 contains ample references to support Conover's claim that management  
12 terminated Mr. Gress based in part on the reports by Mr. Gress's colleagues that he  
13 was unavailable or hard to reach during the 2009 coaching season. Dep. of  
14 Record, ECF No. 19-10 at 7; Decl. of Rawlings, ECF No. 20 at 2-3.

15 Mr. Gress argues that a third dispute stems from inconsistent statements by  
16 Conover management regarding whether Mr. Gress would have continued to  
17 receive his actual pay had he gone on short-term disability. Mr. Gress argues that  
18 these inconsistent statements go to the issue of whether Conover would have  
19 benefitted had Mr. Gress elected to take short-term disability and FMLA leave for  
20 his wrist injury.

1 Mr. Gress's argument is too speculative to support a material factual dispute  
2 that would avoid summary judgment. The only evidence that Mr. Gress offers in  
3 support of the alleged dispute is Ms. Morrow's deposition testimony that a person  
4 who takes short-term leave also takes family medical leave, which is unpaid leave.  
5 Dep. of Morrow, ECF No. 39-14 at 4-5. However, there is no evidence that  
6 Conover's management or employees pressured Mr. Gress to take short-term  
7 disability to avoid paying Mr. Gress his salary and/or wages. As Ms. Morrow  
8 stated during her deposition, Conover may not have "saved [Mr. Gress's] pay"  
9 during any period of short-term disability leave because they may have had to hire  
10 someone to temporarily take over Mr. Gress's duties. Dep. of Morrow, ECF No.  
11 39-14 at 5. Mr. Gress offers no evidence to support that Conover would have  
12 preferred to save Mr. Gress's salary during a period of leave and not have the  
13 benefit of his work.

14 In light of Mr. Gress's failure to establish a prima facie case and survive the  
15 *McDonnell Douglas* burden shifting framework, his wrongful discharge in  
16 violation of public policy claim is properly dismissed. *Hill*, 144 Wn.2d at 180-82.

17 ***Enforceability of Noncompetition Clause***

18 Mr. Gress argues the following regarding the enforceability of the  
19 noncompetition clause:

20 The fact that Conover unilaterally imposes new (and generally reduced) compensation schedules each year makes the three year term

1 of the noncompete provision unreasonable, and indeed fundamentally  
2 unfair. If employees receive only one year of compensation under the  
3 agreement, Conover should only get one year of protection from  
4 competition. Fair is fair. Both ways.

ECF No. 38 at 20.

5 Mr. Gress offers no authority for the proposition that the compensation  
6 terms and the noncompetition restrictions must be of equal duration. Covenants  
7 not to compete upon termination of employment “are enforceable if they are  
8 reasonable.” *Knight, Vale and Gregory v. McDaniel*, 37 Wn. App. 366, 369  
9 (Wash. App. Div. 2 1984) (citing *Sheppard v. Blackstock Lumber Co., Inc.*, 85  
10 Wn.2d 929 (Wash. 1975). The requisite considerations in determining whether a  
11 noncompetition covenant shall be enforced are: (1) whether restraint is necessary  
12 for the protection of the business or goodwill of the employer, (2) whether it  
13 imposes upon the employee any greater restraint than is reasonably necessary to  
14 secure the employer's business or goodwill, and (3) whether the degree of injury to  
15 the public is such loss of the service and skill of the employee as to warrant  
16 nonenforcement of the covenant. *Racine v. Bender*, 141 Wash. 606 (1927).

17 Mr. Gress does not apply any of these considerations to his case, and the  
18 relationship between the length of the noncompetition covenant and the length of  
19 the compensation terms is not one of the requisite considerations. A court  
20 determines the reasonableness of a covenant not to compete as a matter of law.

1 *Perry v. Moran*, 109 Wn.2d 691, 698-99 (Wash. 1987). Therefore, upon finding  
2 that there is no basis to Mr. Gress's claim that the covenants not to compete are  
3 unenforceable, the Court dismisses Mr. Gress's claim for a declaratory judgment  
4 precluding enforcement of the covenant not to compete on summary judgment.

5 Accordingly, **IT IS SO ORDERED:**

- 6 1. The Defendant's Motion for Summary Judgment, **ECF No. 16**, is  
7 **GRANTED**.
- 8 2. This action is **DISMISSED WITH PREJUDICE** and without costs  
9 as to any party.
- 10 3. All pending motions, if any, are **DENIED AS MOOT**.
- 11 4. All pending deadlines and hearing dates, if any, are hereby  
12 **STRICKEN**.

13 The District Court Executive is directed to enter this Order, enter judgment  
14 against Plaintiff and in favor of Defendant, forward copies to counsel, and close  
15 the file.

16 **DATED** this 16th day of September, 2011.

17  
18 *s/ Rosanna Malouf Peterson*  
19 ROSANNA MALOUF PETERSON  
20 Chief United States District Court Judge